

## Towards Proceduralisation of Private Law in the European Multi-Level System

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Universität Bremen

**ZERP**

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## **Towards Proceduralisation of Private Law in the European Multi-Level System**

ZERP-Working Paper 3/2010

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The essay is based upon the contribution of Christian Joerges to the previous edition ('On the Legitimacy of Europeanising Private Law: Considerations on a Law of Justi(ce)-fication (*justum facere*) for the EU Multi-level System', 159-190, and the condensed version of this essay ('Europeanisation as Process: Thoughts on the Europeanisation of Private Law', *European Public Law* 11 (2005): 62-82). It is at the same time a product of the intense cooperation of the two authors over more than a decade. Co-operation is not a merger of academic identities. We share many premises and differ nevertheless programmatically in our views on a number of issues. We refrain from discussing these differences here and simply underline that the conflict of laws approach we submit here is compatible with assigning functions of smooth and gradual convergence to a European code prepared by an adequate transnational forum such as a European Law Institute as advocated *inter alia* by Ch. Schmid, 'Legitimacy Conditions of a European Civil Code', *Maastricht Journal of European and Comparative Law* 8 (2001): 277; recently further developed in *idem*, 'A European Civil Code as a Building Block of a Common Identity?', review essay on: H. Collins, 'The European Civil Code', *European Review of Contract Law* 2010 (forthcoming) and *idem*, *Die Instrumentalisierung des Privatrechts durch die EU*, epilogue, 2010 (Baden-Baden: Nomos, forthcoming).

## **Editorial**

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## Preliminary Remark

Academic debates on the Europeanisation of private law have intensified since the publication of the last edition of the present volume, and the practical involvement of European institutional actors has become stronger. Intensity and strength, however, do not, by themselves, indicate consolidation and progress. Quite to the contrary. The future of the project of a European code of private law is uncertain at best. Its contours, as defined and re-defined by Europe's institutional actors, are blurring. Its evaluation is more controversial than ever. The new uncertainties and controversies mirror broader irritations originating in the wider political context in which European private law is embedded. The constitutional ambitions of the European Convention have, after lengthy, cumbersome and contingent processes, been downgraded to a 'Treaty on the Functioning of the Union'.<sup>1</sup> The European Court of Justice, once the admired and praised motor of integration, has come under unheard-of attacks.<sup>2</sup> Socio-economic diversity in the enlarged Union is deepening, rather than diminishing – and Europe remains plagued by concerns over its problem-solving potential and its acceptance amongst citizens. Should Europe be 'a faltering project' as Jürgen Habermas, its unconditional defender for so many years, now warns us?<sup>3</sup>

This context is important for private law but will remain in the background of our analyses. We can safely assume that Europe will not fade away. What we also have to envisage, however, is the need to take the fortunate motto of the unfortunate Constitutional Treaty<sup>4</sup> more seriously. How to accomplish Europe's '*unitas in diversitate*', how to reconcile the openness of national markets with differences in legal cultures, differently shaped relations between state and society, how to widen and transform the 'integration through law' agenda accordingly – all these queries are a subtext of our deliberation.

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1 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, Consolidated Version of the Treaty on the Functioning of the European Union, 9 May 2008, OJ 2007, C 306, 1.

2 See R. Herzog & L. Gerken, 'Stoppt den Europäischen Gerichtshof', *Frankfurter Allgemeine Zeitung* of 8/9/2008, available at <<http://www.cep.eu>>; F. Scharpf, 'The only solution is to refuse to comply with ECJ rulings', *Social Europe Journal* 4 (2008), 16-21.

3 *Europe: The Faltering Project*, translated by C. Cronin, (Cambridge MA: Polity Press, 2009).

4 Art. IV-1 of the DCT, OJ 2004, C 310, 1.

## I. Core Thesis and Structure of the Argument

The Europeanisation process requires orientation and guidance by a ‘law of law production’: this is the message which our title seeks to transmit through the notion of ‘proceduralisation’. This core message continues and renews the thrust of the previous edition with its somewhat enigmatic notion of ‘Law of Justi(ce)-fication (*justum facere*)’.<sup>5</sup> However, this message is one of caution, a warning against any comprehensive substantive programming in European private law, and is a plea for a focus on the *quality* of law generation. We believe that the turn to proceduralisation is more important than ever, given the unruly state of the European Union and the severe disintegration and fragmentation processes which have affected European private law in recent times. Significantly, these extend to all three of its core spheres, or ‘lives’: the codification process, secondary (mainly consumer) law, and the jurisprudence of the ECJ.<sup>6</sup>

The first and most significant life, the preparatory process of a European contract or even a civil code, had started auspiciously. In the wake of the euphoric ‘constitutional movement’ leading to the Nice Fundamental Rights Charter and the Laeken mandate to elaborate a constitutional treaty, the Council advocated the elaboration of a European contract law, and mandated the Commission to launch the preparatory process. As a first step, the Commission published the 2001 White Paper on contract law, in which different legal policy options were presented and a consultation process launched.<sup>7</sup> The feedback from legal science, practice, business and politics prompted the Commission, in its 2003 Action Plan,<sup>8</sup> to call for a horizontal instrument, alongside further measures of sector-specific integration, in order to increase the overall coherence of European private law. To this end, a ‘Common Framework of Reference’ (CFR), which was to contain common terminology, principles and rules on core areas of private law, was to be elaborated. The CFR should constitute the basis of a subsequent ‘optional instrument – a seemingly harmless neologism for a European contract code which should be applicable either through the parties’ choice of law (‘opt in’ solution) or as a dispositive regime for transnational cases if the parties had not excluded its application (the ‘opt out’ solution). The preparatory work was then assigned to two transnational net-

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5 Taken from R. Wiethölter, ‘Just-ifications of a Law of Society’, in *Paradoxes and Inconsistencies in the Law*, ed. O. Perez & G. Teubner (Oxford: Hart Publishing, 2005), 65-77.

6 See Ch. Schmid, ‘The Three Lives of European Private Law’, ZERP-WP 2009 No. 9, available at: [www.zerp.uni-bremen.de](http://www.zerp.uni-bremen.de).

7 COM(2001), 398 final of 11.07.2001.

8 COM(2003), 68 final of 12.02.2003.

works of academic experts: the so-called *Study Group on a European Civil Code* (the follow up group of the Lando group, directed by Christian von Bar), working on a classic comparative law basis, and the *Research Group on the Existing EC Private Law* (the ‘*Acquis-Group*’, directed by Hans Schulte-Nölke), aiming at developing European private law upon the basis of the already existing legislative and judicial *acquis* in that field. The work of the groups was financed under the Sixth Framework Programme for Research and Development, which was instrumentalised for this purpose. The work of the groups was accompanied by a so-called stakeholders network (representing civil society) and by another network of Member State representatives. In 2008 and 2009, these published academic drafts of the common frame of reference (DCFR), which resembles a comprehensive codification of contract law and its neighbouring fields at European level.<sup>9</sup> The proposed rules together with comments and illustrations encompass around 10,000 pages. As well as serving as a tool and a source of inspiration for research and teaching, the academic DCFR is intended to provide a model for a political CFR.

Yet, already in 2005, after the failure of the Constitutional Treaty in the French and Dutch referenda, the political climate had changed. The Commission indicated that, from then on, it would prioritise a revision of the consumer contract law *acquis*. The latter was disconnected from the codification process in the following years in order to become a kind of second life of European private law. This trend became apparent with the 2007 Green Paper on the revision of the consumer *acquis*. In fact, the Green Paper did not refer to the DCFR, which was already available unofficially at that time, though it contained a questionnaire with issues for consultation with alternative rule proposals, all of which had already been dealt with in the DCFR.<sup>10</sup> This means that even the minimalist toolbox function of the CFR was frustrated. The scission between the CFR process and the consumer *acquis* was confirmed in the 2008 proposal for a Consumer Rights Directive (CRD).<sup>11</sup> This scission is documented not just by the complete lack of consideration of the CFR, even in cases in

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9 *Principles, Definitions and Model Rules of European Private Law*, ed. Study Group and Acquis Group, (Munich: Sellier, provisional edition 2008; full edition (6 volumes), 2009).

10 See M. Hesselink, ‘The Consumer Rights Directive and the CFR: Two Worlds Apart?’, *European Review of Contract Law* 5 (2009): 290, at 294; K. Lilleholt, ‘A Step Backward for Consumer Protection and for Contract Law Harmonisation? Notes on the Proposal for a New Directive on Consumer Rights’, *European Review of Private Law* 17 (2009): 335.

11 COM(2008) 614, 3 final of 08.10.2008.



which the CRD deviates from existing *acquis* incorporated in the CFR.<sup>12</sup> At a fundamental level, the scission is also shown by the fact that the CRD, unlike the CFR and all other national private law instruments, deviates from the classic ethical concept of private law, which pursues justice between the parties in the individual case (normally commutative, sometimes also distributive justice) as the highest objective. Instead, the CRD sacrifices justice between the parties in favour of providing European businesses with a basic, but uniform, regulatory framework for market transactions with consumers. This harsh judgement is based less upon the fact that the CRD diminishes the standard of consumer protection in many instances - not only when compared to many Member States, but also to the existing European *acquis*. Instead, it mainly derives from the legal-technical consequences of the CRD's maximum harmonisation approach,<sup>13</sup> which constitutes a straitjacket for private parties and Member States alike. Thereby, Member States may no longer provide for stronger consumer protection in national law, but are strictly bound to the level foreseen in the Directive. The Commission has attempted to justify the need for maximum harmonisation in a 300 page impact assessment report annexed to the draft, which postulates huge efficiency losses in cross-border transactions due to persisting legal divergences. As a response, the fully-harmonised CRD wants to provide businesses with a single regulatory framework in order both to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area.<sup>14</sup> Contrary to the hollow propaganda aim of the Directive, in order to enable also consumer trust and reliance through a single regulatory framework, consumers were, of course, far better

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12 To give but one striking example, Art. 12 CDR on the consumer's right to withdrawal in off-premises and distance contracts, surprisingly no longer refers to the notification of the withdrawal right to the consumer as starting point of the withdrawal period. This is in striking contrast not only to Art. II-5:103 (2 b) and 104 DCFR, but also to Arts. 4 and 5 Doorstep Sales and Articles 5 and 6 Distance Sales Directive.

13 The turn to maximum harmonisation, already applied in the 2002 Financial Services Distance Sales Directive, the 2005 Unfair Commercial Practices Directive and the 2008 New Consumer Credit Directive, is rightly viewed as a new era in European consumer law by H.-W. Micklitz & N. Reich, 'Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights', *Common Market Law Review* 46 (2009): 471. See, also, the critiques by V. Mak, 'Review of the Consumer Acquis: Towards Maximum Harmonisation?', *European Review of Private Law* 17 (2009): 55-73, and S. Whittaker, 'Unfair Contract Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of 'Maximum harmonisation'', *European Review of Contract Law* 5 (2009): 223.

14 CRD, Recital 20.

served by a common minimum standard which could be, and actually was,<sup>15</sup> extended by Member States to their benefit - whereas they are now subjected to a reduced standard of protection even in internal cases, which amounts to a “McDonaldisation” of European consumer protection.<sup>16</sup>

The last core element of European private law, the jurisprudence of the ECJ, has anticipated and backed up the full harmonisation strategy, thus increasing its own power in European private law. Already in 2002, the Court interpreted the early and fragmented Product Liability Directive as a full harmonisation instrument. As will be shown below, this has generated devastating effects on private parties in the *Sanchez* case.<sup>17</sup> The situation is even worse in European labour law, where the ECJ has applied the full harmonisation principle to the Posted Workers Directive in *Laval*<sup>18</sup> and *Rüffert*,<sup>19</sup> which allowed undertakings incorporated in Eastern European countries to undercut wages stipulated by collective agreements in Western European countries and forbidding the respect, up until now mandatory under regional German law for tenders, for minimum wages stipulated by collective agreements. However, if labour competition were to intensify at the expense of Western European workers who cannot survive in their home countries with lower Eastern European wages, anxieties about the ‘Polish plumber’, who was so often cited in the French ‘*non*’-campaign against the Constitutional Treaty, may eventually materialise. Never in the history of European integration has the critique of the Court’s jurisprudence, in particular, by trade unions, been so drastic.<sup>20</sup> Un-

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15 For details, see the impressive *EC Consumer Law Compendium*, elaborated for the European Commission by H. Schulte-Nölke, Ch. Twigg-Flesner & M. Ebers in 2008.

16 In this sense, N. Reich, ‘Die “McDonaldisierung” des Verbraucherrechts – oder: Von der “vollständigen Harmonisierung” zur vollständigen Abschaffung” eines eigenständigen nationalen Verbraucherschutzrechts?’, *Verbraucher und Recht* (2009): 361.

17 Case C-183/00, *González Sánchez*, [2002] ECR I-3901, see, below, Section IV 1; other cases decided along the same line include C-52/00, *Commission v. France*, [2002] ECR I-3827; C-154/00, *Commission v. Greece*, [2002] ECR I-3879; C-402/03, *Skov v. Bilka Lavprisvarehus*, [2006] ECR I-199; for a different approach see C-285/08, *Leroy Somer*, nyr, *Europäische Zeitschrift für Wirtschaftsrecht* 20 (2009): 501, regarding the award of damages for a professionally used product – with the paradoxical result that the protection of private consumers will often be weaker than in the case of professional users.

18 Case C-341/05, *Laval*, [2007] ECR I-11767.

19 Case C-346/06, *Rüffert*, [2008] ECR I-01989.

20 Compare, for example, European Trade Union Confederation, Resolution: ETUC response to ECJ judgments *Viking* and *Laval*, available at: <[www.etuc.org](http://www.etuc.org)>. In the academic literature, many negative comments have been published on these decisi-

surprisingly in view of the, at their surface, often merely ‘technical nature’ of private law, the ECJ has displayed little sensitivity for the legitimacy *problématique* of the Europeanisation process in that sphere.

Against the background of this scenario, our plea for a ‘procedural turn’ in private law in the European multi-level system has a threefold constructive potential. For one, reconstructing law-generating patterns in the European multi-level system will, by no means, uncover only disintegrative failures but will also unfold the productive and innovative dimensions of the Europeanisation process. Second, proceduralisation is, in our view, the proper form of Europe’s constitutionalisation – and its only chance: Europeanisation must derive its legitimacy from the normative quality of the processes within which it takes place. Last, but not least, the modes of proceduralisation, which we are going to develop, have the potential to defend and to develop the social dimension in Europe’s private law.

We are going to develop our argument in the following steps: the first is fundamental, in the literal sense; the legal disciplines instructing the Europeanisation process assume, each in their own way, that legal systems are organised nationally; Europe, on the other hand, constitutes a post-national constella-

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ons in nearly all jurisdiction of “Old Europe” For a non-exhaustive selection, see B. Bercusson, ‘The Trade Union Movement and the EU: Judgment Day’, *European Law Journal* 13 (2007): 279; A. Davies, ‘One Step Forward, Two Steps Back?’, *Industrial Law Journal* 37 (2008): p. 126; P. Chaumette, ‘Les actions collectives syndicales dans le maillage des libertés communautaires des entreprises’, *Droit Social* 4 (2008): 210; G. Orlandini, ‘Right to Strike, Transnational Collective Action and European Law’, Jean Monnet WP Series 08/07; E. Kocher, ‘Die Tariftreueerklärung vor dem EuGH’, *Der Betrieb* 19 (2008): 1042; M. Corti, ‘Le decisioni ITF e Laval della Corte di Giustizia’, *Rivista Italiana del Diritto di Lavoro* I (2008): 254 *et seq.*; R. Eklund, ‘A Swedish Perspective on Laval’, *Comparative Labour Law & Policy Journal* 29 (2008): 551; F. Bayreuther, ‘Tariftreue vor dem Aus’, *Neue Zeitschrift für Arbeitsrecht* 11 (2008): 626; E. Dockès, ‘L’Europe antisociale’, *Revue de Droit du Travail*, 2009: 11; L. Azoulay, ‘The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization’, *Common Market Law Review* 45 (2008): 1335; Ch. Joerges & F. Rödl, ‘Informal Politics, Formalised Law and the “Social Deficit” of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*’, *European Law Journal* 15 (2009): 1–19; Ch. Schmid, ‘From *effet utile* to *effet néolibéral*: A Critique of the new Methodological Expansionism of the European Court of Justice’, in *Conflict of Laws and Laws of Conflict in Europe and Beyond - Patterns of Supranational and Transnational Juridification*, ed. R. Nickel, RECON Report No. 7, Oslo 2009, 421–446 – and it does not happen often that the Ministry of a major Member state organises a forum for such critique: ‘Symposium on “The Impact of the Case Law of the ECJ upon the Labour Law of the Member States”, German Federal Ministry of Labour and Social Affairs, Berlin, 26 June 2008.

tion; it is no longer an aggregation of nation states, but a multi-level system. This is why it has to develop a legal discipline beyond ‘methodological nationalism’ (Section II). Moreover, the order of the European multi-level system of governance cannot copy hierarchical or federal models. Its law must, instead, respond to the conflict patterns, which are inherent in this *sui generis* mode of governance (Section III). We then examine three different patterns of juridification, of *Recht-Fertigung* (‘justi(ce)-fication’), induced by Europe, to document the opportunities and risks entailed by the Europeanisation process (Section IV). In the final part, we will further elucidate the normative perspectives that can be associated with the procedural paradigm (Section V) and complement our analyses by an Epilogue on ‘the contest between social justice and private law’ in the Europeanisation process.

## II. The Irresolvable Contest of Legal Disciplines

‘European law’ has quite firmly established itself as the master discipline of the European integration project. ‘Integration through European law’ as conceptualised in the formative period of the European Economic Community is a project which pre-supposed specific conditions and was targeted to fairly narrowly-defined objectives. For the understanding of the present difficulties of legal integration, it is important to remain aware of this starting point. This is equally important with regard to other legal disciplines which European law is encountering in its expansionist dynamics. Private international law and comparative law deserve particular attention here because these disciplines possess an inherent potential to contribute to the establishment of a new European order – and both of them have never abandoned that claim.

These are good reasons to wonder about the normative grounds upon which the victory of European law over its neighbouring disciplines and their competing perspectives and legal yardsticks may be based. One may even question whether the contest between these legal disciplines has come to a definite rest.<sup>21</sup> To take the example of private law: Is European law best equipped to

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21 In a famous treatise first published in 1798, which this section’s heading alludes to, Kant referred not only to the sub-disciplines of one faculty. Alluding to Kant’s valuation of philosophy is justified: jurisprudence, much to the contrary of Kant’s derisory remarks, cannot limit itself to a function that serves given authorities, but must become productive and make use of what Kant names “reason”. See Ch. Joerges. ‘The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines — an Analysis of the Directive on Unfair Terms in Consumer Contracts’, *European Review of Private Law* 3 (1995): 175.

guide the Europeanisation process? Can comparative law claim to be better prepared to instruct us about a suitable system of legal rules for Europe? And why should not private international law be entitled to teach us how to combine the construction of a functioning European private law system with the respect for national legal traditions? Though these questions are intriguing, we will not pass judgement on the capabilities or disabilities of entire legal disciplines here.

Our argument is more narrow and is still daring enough. We claim that none of the three disciplines should win the contest, because none of them is sufficiently equipped to come to terms with the specifics of Europe's post-national constellation. All of them have to overcome their inherited 'methodological nationalism',<sup>22</sup> *i.e.*, their entanglement in the concepts and methodologies of presumably sovereign nation states. This allegiance was bound to erode in the course of European integration and in the processes of globalisation (de-territorialisation and de-nationalisation). Europeanisation, we argue, needs to be guided by a new post-national discipline. This argument may look more daring than it is meant to be. As our last remarks have indicated, we believe that transformation processes are already under way. Our claim is, hence, in more modest terms, that it is sufficient to highlight developments that are actually taking place, and that all we have to do is acknowledge the emergence of a post-national discipline – and to define or to discover suitable legal categories and methodologies.

## II.1 *European Law*

Our claim that legal science continues - rather stubbornly - to adhere to national categories of thought must sound surprising, if not strange, in relation to the first mentioned discipline, namely, European law. Is not the European construction exactly the negation, the *Aufhebung* of the nation state? Is not the specific characteristic of European law precisely a claim to supranational validity<sup>23</sup> without any need for Europe to become a state first? And could not maybe private law, even though it is a 'latecomer' to the integration process,

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22 M. Zürn, 'The State in the Post-National Constellation – Societal denationalisation and Multi-Level Governance', ARENA Working Paper No. 35/1999, available at: <[www.arena.uio.no](http://www.arena.uio.no)>. It is not only Zürn who uses the term (see, for example, Beck, 'Beyond Methodological Nationalism, Towards a New Critical Theory with a Cosmopolitan Intent', *Constellations* 10 (2003): 453-467, but I keep to Zürn's interpretation sketched out in section IV below.

23 ECR [I963], 24 (Van Gend en Loos).

become some sort of a test case for transnational non-statal law,<sup>24</sup> in particular, when it would require no more of private law than to revise its own traditions?

European constitutionalism is, indeed, deeply involved in pertinent efforts. Suffice it here to point to two prominent examples from Germany. The former constitutional judge Dieter Grimm, by no means a Euro-sceptic, continues to object to the use of the term ‘constitution’ for the European polity.<sup>25</sup> His brethren from the German Constitutional Court delivered, in their recent judgment on the Treaty of Lisbon, a more drastic confirmation of this negative fixation: Germany must not participate in a federal entity; it has to safeguard its constitutional identity.<sup>26</sup> In the context of private law, the debate on the code provides the most telling example. The most ardent academic advocate of a European code, namely, Christian von Bar,<sup>27</sup> more than others emphasises that legislation should draw on the authority of science and scholarly deliberation, rather than politics. His views quite accurately reflect the self-understanding of Germany’s Pandectists of the Nineteenth century.<sup>28</sup> The German Civil Code did, then, at the turn of the last century, symbolise the emergence of a German nation state. It seems politically highly unlikely that a European Civil Code could play a similar part. Though the project of a European Civil Code has had

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24 See N. Jansen & R. Michaels, ‘Private Law and the State, Comparative Perception and Historical Observation’, *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 71 (2007): 345; Gralf-Peter Calliess, ‘Transnationales Verbraucher-vertragsrecht’, *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 68 (2004): 244.

25 D. Grimm, ‘Integration by Constitution?’, *International Journal of Constitutional Law* 3 (2005): 193; *idem*, ‘The Constitution in the Process of Denationalization’, (2005) 12 *Constellations*, 447.

26 *Bundesverfassungsgericht*, file no.: 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 und 2 BvR 182/09; see comments in *German Law Journal* 10:8 (2009), available at: [www.germanlawjournal.com](http://www.germanlawjournal.com); A. Fischer-Lescano, Ch. Joerges & A. Wonka (eds), ‘The German Constitutional Court’s Lisbon Ruling: Legal and Political Science Perspectives’, ZERP WP 1/2010. available at [www.zerp.uni-bremen.de](http://www.zerp.uni-bremen.de).

27 See Ch. von Bar, ‘From Principles to Codification: Prospects for European Private Law’, *Columbia Journal of European Law* 9 (2002): 379.

28 See, poignantly, H.H. Jakobs, *Wissenschaft und Gesetzgebung im bürgerlichen Recht nach der Rechts- quellenlehre des 19. Jahrhunderts*, (Paderborn: Schöningh, 1983), 160: ‘The German Civil Code is ‘... a code of law, the sources of which can be found not in itself, but in the legal science that has created it; a code of law seeking to be dominated by, rather than to dominate, science...’. (our translation); see, for closer analysis, Ch. Joerges, ‘Die Überarbeitung des BGB-Schuldrechts, die Sonderprivatrechte und die Unbestimmtheit des Rechts’, *Kritische Justiz* 20 (1987): 166.

a mobilising effect throughout legal science,<sup>29</sup> it seems also inconceivable that Europe's democratic societies would tolerate the rule of '*Professorenrecht*'.<sup>30</sup> On the other hand, even a 'hard code' which would prescribe a welfarist model of private law<sup>31</sup> is simply illusory. The Commission has, up until now, carefully avoided taking a definitive position by promoting the chameleon of the Common Framework of Reference – and thereby implicitly confirmed the need for a third way.<sup>32</sup> Indeed, it has become by now evident that a European code, if desirable at all, could not simply replicate its Nineteenth and Twentieth century national predecessors, but would need to be adapted to the particular features of the European multi-level system.<sup>33</sup>

## II.2 Comparative Law

'*Im Westen nichts Neues*' – by this allusion to Erich Maria Remarque's famous novel, Ralf Michaels has characterised the proceedings of the World Congress of Comparative Law in 2000.<sup>34</sup> Since then we have been witnessing a true renaissance of comparative law.<sup>35</sup> For long decades it was – in Germany and elsewhere – virtually self-evident that comparative research would focus on

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29 See K. Riedl, *Vereinheitlichung des Privatrechts in Europa*, (Baden-Baden: Nomos, 2004).

30 H. Schepel, 'Professorenrecht? The Field of European Private Law', in P.A.J. van den Berg, *Lawyer's Circles – Lawyers and European Legal Integration*, ed. P.A.J. van den Berg, (The Hague: Elsevier Reed, 2004), 115-124; see *infra* section III.3.

31 U. Mattei, 'Hard Code Now!', *Global Jurist Frontiers* 1 (2002), Article 1.

32 Interestingly, new commissioner Viviane Reding, apparently not irritated by previous controversies, has used very clear language. In her answer to a question from the European parliament she 'flagged' with the highest priority the project of moving 'from the first building blocks of European contract law (common frame of reference, standard terms and conditions, consumer rights) to a European Civil Code', albeit one 'which could take the form either of a voluntary tool to improve coherence, or of an optional 28th contract law regime or of a more ambitious project'. However, it is too early to say whether this speech marks a definitive shift in the Commission's position in favour of a code (full text available at: [http://www.europarl.europa.eu/hearings/static/commissioners/answers/reding\\_replies\\_en.pdf](http://www.europarl.europa.eu/hearings/static/commissioners/answers/reding_replies_en.pdf)).

33 See, in this perspective, H. Collins, *The European Civil Code. The Way Forward*, (Cambridge: Cambridge University Press, 2007).

34 R. Michaels, '*Im Westen Nichts Neues*', *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 66 (2002): 97.

35 See, for example, A. Engelbrekt, J. Nergelius & E. Elgar, *New Directions in Comparative Law*, (Cheltenham: Edward Elgar Publishing, 2010), 185, at 194 et seq.).

American law, and only on American law. In the meantime, the *Common core* project alone attracts, year after year, a growing number of comparative lawyers from all over Europe and the rest of the world to Trento.<sup>36</sup> Comparative law casebooks are available.<sup>37</sup> European universities have extended their intra-European comparative research with some enthusiasm, provoking not only quantitative, but also qualitative, improvements – a real renaissance.

Again, it would be adventurous to try to force what has become a rich and diverse theoretical debate into a uniform agenda. And just as is the case for European law, the claim that comparative law is pervaded by methodological nationalism may alienate the reader at first. But it holds true, in our view, as shall be demonstrated by turning to the views of two important exponents and opponents. Reinhard Zimmermann, on the one hand, reveals, in his numerous works, that the common European legal heritage, the *ius commune europaeum* continues to have a considerable impact on continental civil law systems and throughout the English (but not the American) common law. He seems to be sketching out the foundations of a position in favour of transnational and non-state private law.<sup>38</sup> But, in his theoretical approach, Zimmermann combines historical studies and practical work on law. His writings on legal history are meant to provide support to non-legislative codification movements. It comes as no surprise that the title of the first section of the Introduction to the Historic-critical Commentary on the German Civil Code reads: ‘The European Codification Movement’.<sup>39</sup> The section then ensures us that:

*‘the codifications have not rendered learned jurists redundant, nor have they led to a permanent consolidation (or fossilisation) of private law. But they did*

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36 Bussani & Mattei (eds), *The Common Core of European Private Law, Essays on the Project*, (Alphen aan den Rijn: Kluwer Law International, 2002); on this and with a further impressive summary of the discipline’s *status quo*, Gambaro, ‘The Trento Theses’, *Global Jurist* 4 (2004), No. 1, Article 2.

37 Ch. von Bar, *The Common European Law of Torts*, vol. 1, (Oxford: Clarendon Press, 1998); W. van Gerven et al., *Tort Law and Scope of Protection: Cases, Materials and Text*, (Oxford: Hart Publishing, 1998). Further volumes in the *Ius Commune* casebook series include: W. van Gerven, P. Larouche & J. Lever, *Tort Law*, (Oxford: Hart Publishing, 2000); H. Beale, et al., (eds), *Contract Law*, (Oxford: Hart Publishing, 2002); J. Beatson & E.J.H. Schrage (eds), *Unjustified Enrichment*, (Oxford: Hart Publishing, 2003); D. Schiek, L. Waddington & M. Bell (eds), *Non-Discrimination Law*, (Oxford: Hart Publishing, 2007).

38 See R. Zimmermann, ‘Heard Melodies are sweet, but those unheard are sweeter ...’, *Archiv für die civilistische Praxis*, 193 (1993): 122; *idem*, ‘Roman Law and European Legal Unity’, in this volume.

39 R. Zimmermann, *Historisch-Kritischer Kommentar zum Bürgerlichen Gesetzbuch*, (Tübingen: Mohr/Siebeck, 2003) paras. 1 et seq. before § 1.



*facilitate, on the one hand, national fragmentation of legal traditions ... on the other, the codifications ended the "second life" of Roman law, the history of its direct practical application...*<sup>40</sup>

The Europeanisation of private law cannot and should not rewind the clock of history. But historical legal scholarship is trying to feed into it an awareness of its pan-European foundations – to boost the European codification project, which would create and symbolise a uniform European legal space.

At the opposite end of the spectrum of comparative contributions is Pierre Legrand.<sup>41</sup> His non-convergence thesis, his rigid opposition to functionalism in comparative law and to codification movements is based upon the assertion that common law and civil law cannot communicate because the law is a cultural phenomenon and European legal cultures have developed, quite simply, in an incompatible way. Both Zimmermann and Legrand loosen ties between law and the nation state. Yet, both remain, themselves, tied to a methodological nationalism: Zimmermann in that he seeks to follow the example of historical legal science in the codification movement; Legrand in that he deduces from the cultural features of common law and civil law their political autonomy.<sup>42</sup>

The *Gretchen* question, to which these and so many other contributions have to respond, concerns the guidance which comparative studies can provide in Europe's search for the private law of the Europeanisation process. In the neighbouring globalisation *problématique*, comparativists tend towards the privatisation option: law can best serve the legal needs of transnational markets through the dissolutions of its links with state orders.<sup>43</sup> Within the European

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40 Our translation.

41 Poignantly, for example: 'European Legal Systems are not Converging', *International and Comparative Law Quarterly* 45 (1996): 52; 'Against a European Civil Code', *Modern Law Review* 60 (1997): 44; *idem*, 'Antivonbar' *Journal of Comparative Law* 1 (2006): 13.

42 These are no more than cursory remarks. Hein Kötz, representing the leading – functionalist – school of comparative law, has always been sceptical towards the idea of codification; see his *Gemeineuropäisches Zivilrecht*, *Festschrift Konrad Zweigert*, (Tübingen: Mohr/Siebeck, 1981), 481-500; methodologically strict exponents of the common core project are agnostic in terms of legal policy: for example, Bussani, *ibid.*, (note 17 *supra*), but also U. Mattei, 'Hard Code Now!', *Global Jurist Frontiers*, 2, No. 1 (2002), Article 1. The *Gretchen* question, however, remains whether comparative law can give up its perception of autonomous legal systems. How can we conceptualise their inter-dependencies and the emergence of multi-level systems with interconnected competences?

43 See N. Jansen & R. Michaels (note 24 *supra*); G.-P. Calliess, 'Transnationales Verbrauchervertragsrecht' (note 24 *supra*); critiques: Ch. Möllers, 'Transnational Governance without Public Law?', in *Transnational Governance and Constitutiona-*

Union, this option cannot be pursued rigidly. What comparative studies reveal, instead, are obstacles to legal ‘unification from above’: the disintegrative side effects of integration, the simultaneity of convergence and divergence,<sup>44</sup> and the operation of transplants as ‘legal irritants’.<sup>45</sup> Such findings confirm the need for a new discipline, which we are advocating.

### II.3 Private International Law

The response to legal diversity through a transformation of inter-jurisdictional relations into a ‘lawful condition’ (*Rechtszustand*<sup>46</sup>) is the grandiose objective of private international law, which one can, for precisely this reason, understand as the master among all legal disciplines with transnational ambitions. However, even private international law carries with it the legacy of methodological nationalism. This is apparent not only from the origin of its rules in national legal systems, but also holds true with regard to its prevailing conceptual

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*lism*, ed. Ch. Joerges & I.-J. Sand & G. Teubner, (Oxford: Hart Publishing, 2004), 329-338; K. Günther, ‘Kann das Zivilrecht im Zuge der Globalisierung das öffentliche Recht ersetzen?’ in Ch. Joerges & G. Teubner (eds), *Rechtsverfassungsrecht*, (Baden-Baden: Nomos, 2003), 295-311; Ch. Joerges & O. Gerstenberg, *Private governance, democratic constitutionalism and supranationalism*, Luxembourg: European Commission (Directorate-General Science, Research and Development; EUR 18340 EN) 1998. F. Rödl, ‘Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law “Beyond the State”’, *American Journal of Comparative Law* 56 (2008): 743.

44 See G. Brüggenmeier & Ch. Joerges, ‘Europäisierung des Vertrags- und Haftungsrechts’, in *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, ed. P.-Ch. Müller-Graff (Baden-Baden: Nomos, 2nd. ed. 1999), 301-360; H. Muir Watt, ‘Globalization and Comparative Law’, in *The Oxford Handbook of Comparative Law* ed. M. Reimann & R. Zimmermann (Oxford: Oxford University Press, 2002): 579 et seq., at 586-588; J. Friedman, ‘Being in the World: Globalisation and Localisation’, *Theory Culture & Society* 7 (1990): 311-328.

45 G. Teubner, ‘Legal Irritants: Good Faith in British Law Or How Unifying Law Ends Up in New Differences’, *Modern Law Review* 61 (1998): 11.

46 I. Kant, ‘Perpetual Peace. A Philosophical Sketch’, (1796), in *idem.*, *Political Writings*, (H. Reiss, ed), (Cambridge: Cambridge University Press, 1991), 93-130: for an explanation, see J. Habermas, ‘Kant’s Idea of Perpetual Peace: At Two Hundred Years’ Historical Remove’, in: *idem.*, *Inclusion of the Other: Inclusion Studies in Political Theory*, ed. by C. Cronin & P. de Greiff (Oxford: Blackwell Publishers, 2002), 165-202.

orientations.<sup>47</sup>

European and Private International Law (PIL) lived separate lives for a long time, encouraged by a culture of non-communication, in which European lawyers defined themselves as public law while PIL resorted to private law. Thus, for a long time, it went practically unnoticed that the European Court of Justice (ECJ) adjudicated constellations that had already been thoroughly thought through by PIL. Nowhere did overlaps receive greater attention or were discussed earlier than in Germany. Several stages and strands in pertinent discussions can be distinguished: a first phase, was when PIL was recommended as a soft alternative to harmonisation.<sup>48</sup> This was clearly an unrealistic perspective. However, the new competences in the Treaty of Amsterdam (old Article 65, new Article 81) have paved the way for a new complementary relationship. A second one, still ongoing,<sup>49</sup> is one in which European law – in particular, the fundamental freedoms and the non-discrimination principle, and the mutual recognition jurisprudence – were invoked to correct traditional PIL rules.<sup>50</sup> Our contribution advocates a third vision, which we will develop step by step in the following sections.<sup>51</sup>

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47 See the poignant analysis in F. Rödl, 'Weltbürgerliches Kollisionsrecht. Über die Form des Kollisionsrechts und seine Gestalt im Recht der Europäischen Union', Ph.D Thesis EUI Florence 2008, part 1 B.II.

48 See, for example, K. Kreuzer, 'Die Europäisierung des internationalen Privatrechts – Vorgaben des Gemeinschaftsrechts', in *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, ed. Müller-Graff, (Baden-Baden: Nomos, 2<sup>nd</sup> ed.1993), 301-360.

49 See the example of company law, discussed in Section IV.2 *infra*.

50 See J. Basedow, 'Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt', *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 59 (1995): 1; summary and analysis of current developments in Ch. Schmid (note\* *supra*), especially in part 3, section 1, sub-section 1.

51 As the readers of this volume will realise, there are more, and in interesting ways, overlapping efforts to adapt conflict of laws to the exigencies of Europe's integrating market. See, in particular, H. Muir Watt, 'The Challenge of Market Integration for European Conflicts Theory', 191-204; see, also, *eadem*, 'Integration and Diversity: The Conflict of Laws as a Regulatory Tool', in *The Institutional Framework of EPL*, ed. F. Cafaggi (Oxford: Oxford University Press, 2006), 107-148.; we concur in the rejection of the traditional public/private divide in conflict of laws (or PIL respectively). We are not in agreement with regard to "the Political" in European conflicts, where Muir Watt places much confidence in the rationality of regulatory competition; for our view, see the discussion of company law in Section IV.2 *infra*.

### III. The Misery of Methodological Nationalism and the Need for a Reconceptualisation of Europe's Postnational Constellation

Our observations so far were concerned primarily with the discrepancies between Europe's post-national constellation and the nation state legacy of three legal disciplines. What may be perceived as a primarily conceptual and doctrinal exercise has, however, serious and challenging theoretical and political implications. These are threefold: (1) We need to reconsider and replace the analytical framework upon which we, mainly only implicitly, build our legal conceptualisations – in this regard we will plead for an explicit turn to the analytics of multi-level governance. (2) As lawyers, we must not treat analytical categories developed by social scientists as valid normative yardsticks. For our understanding of the legal and normative challenges of the European constellation, the multi-level governance analytics is but a heuristic device and starting point in our search for sociologically adequate legal categories. (3) Last, but not least, we have - as students of private law in the EU - to specify these insights with a view to situating the societal functions and normative vocation of private law in the Europeanisation process. This is the most demanding of the three challenges for those who seek to preserve the democratic legacy of the private law systems of constitutional democracies and the promises of social justice which democracy entails.

#### III.1 *Multi-level Governance as Analytical Paradigm in European Studies*

It has become somehow fashionable in legal quarters to resort to political science in legal analyses of the state of the European Union. This opening of the legal world is, to a considerable degree, the result of the 'turn to governance' in European politics<sup>52</sup> - and it has a strong *fundamentum in re*. Decades ago, William Wallace famously realised and explained: Europe is 'Less than a Fed-

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52 Suffice it here to mention the Commission White Paper – COM(428) final of 25.07.2001 – the CONNEX project in Mannheim and the New Gov project at the EUI Florence – both enormously prolific.

eration, More than a Regime'.<sup>53</sup> What is it instead? Lisbeth Hooghe and Gary Marks pioneered the efforts to define positively the Union's position between the two poles by the notion of 'multi-level governance *sui generis*'.<sup>54</sup> The further efforts to clarify the somewhat obfuscating *sui generis* description need not concern us here in any detail.<sup>55</sup> Political theorists with normative aspirations have underlined the ambivalences of the turn to governance; and methodologically sensitive lawyers realise that multi-level governance constitutes a challenge, rather than an accomplishment, if it is contrasted with the concept of democracy as institutionalised in constitutional nation states. This challenge will be discussed in the remainder of this essay. What should be apparent, however, is the need to embark upon new and uncharted seas. Michael Zürn has characterised this situation drastically, but adequately, in diagnosing a 'misery of methodological nationalism'.<sup>56</sup> His diagnosis is so valuable because it rests upon robust descriptions of the irreversible transformations of the contexts of policy-making in the European and extra-European post-national constellation. The nation state is no longer in a position to define its political priorities autonomously (as a 'sovereign'), but is, instead, forced to co-ordinate them transnationally. Not only must states and national citizens recognise such external constraints. They have also become accountable to transnational bodies in which their politics are subjected to evaluation. To be sure, national governments vehemently continue to defend their fiscal powers. 'Whilst resources remain (in?/for the most part) at national level, the formulation of politics has been internationalised and recognition transnationalized'.<sup>57</sup>

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53 W. Wallace, 'Less than a Federation, More than a Regime: The Community as a Political System', in *Policy-Making in the European Community*, ed. H. Wallace & W. Wallace (Oxford: Oxford University Press, 1983), 403-436.

54 G. Marks, L. Hooghe & K. Blank, 'European Integration since the 1980s: State-Centric versus Multi-Level Governance', *Journal of Common Market Studies* 34 (1996): 343.

55 See, instructively, B. Kohler-Koch & B. Rittberger, 'Review Article: The "Governance Turn" in EU Studies', *Journal of Common Market Studies. Annual Review* 44 (2006): 27. L. Hooghe & G. Marks continue to contribute importantly. See, recently, 'A Postfunctional Theory of European Integration: From Permissive Consensus to Constraining Dissensus', *British Journal of Political Science* 39 (2008): 1.

56 Note 7 *supra*.

57 *Ibid.*, 188.

### III.2 *A New Conflicts Law as Response to the Misery of Methodological Nationalism*

The assertion that the inherited legal categories in all of our ‘international’ sub-disciplines mirror the legacy of the nation state is anything but exciting. Equally, it should not come as a surprise that legal science – in constitutional and administrative as well as private law – draws on national and federal examples in its efforts to come to terms with the European as well as the extra-European post-national constellation. Re-orientations are inevitable – and under way in all pertinent disciplines. We have, of course, to refrain from surveying these developments and to content ourselves, instead, with submitting our own position, namely, the idea of a new type of conflicts law as a/the legal paradigm of the European constellation.

A new type of conflicts law, so we assert, is needed simply because the multi-level system of the European Union is characterised by a variety of conflict constellations which contrast markedly with the sociological premises of our legal heritage. This suggestion may continue to sound somewhat idiosyncratic, but it has, by now, attracted some benevolent attention, not least outside legal science. Our approach

*‘distinguishes between vertical, horizontal, and diagonal legal conflicts in the EU, i.e., conflicts about which legal norms apply to a given case. These three types of legal conflict can be applied to MLG generally. Vertical conflicts are conflicts between legal regimes at different territorial levels; they occur both between national law and EU legislation, and between EU law and WTO rules. In horizontal conflicts, which represent the traditional PIL setting, the injunctions of different national laws to a given case diverge. Horizontal legal conflicts occur typically in the context of transactions involving the movement of persons, goods, or finances across national borders. Diagonal legal conflicts finally occur if regimes at two different levels that apply to different aspects of a given case make contradictory demands’<sup>58</sup>*

This is but the conceptual starting point. The conflicts law approach needs to be substantiated and differentiated.<sup>59</sup> However, in the present context, we are

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58 R. Mayntz, ‘The Architecture of Multi-level Governance of Economic Sectors’, (Cologne: MPIfG Discussion Paper 07/13), 23-24 (with references).

59 See, Ch. Joerges, ‘Integration through Conflicts Law: On the Defence of the European Project by means of Alternative Conceptualisation of Legal Constitutionalisation’, in *Conflict of Laws and Laws of Conflict in Europe and Beyond - Patterns of Supranational and Transnational Juridification*, ed. R. Nickel, RECON Report No. 7, Oslo 2009, 631-660) and ‘A New Type of Conflicts Law as the Legal Paradigm of the Post-national Constellation’, in *The Social Embeddedness of Transnational Markets*, ed. Ch. Joerges & J. Falke (Oxford: Hart Publishing, 2010). – P. Kjaer uses the same terminology, but seems to envisage 4 dimensions – and, as a social scientist, is not con-

exclusively concerned with private law proper.

### III.3 *Democracy and Private Law in the European Union*

The challenge of this focus is that modern private law has undergone fundamental changes within its harbouring national orders. These changes have affected both its social objectives and its ('regulatory') functions. They have also affected its normative foundations. The private law systems of constitutional democracies have become 'socially embedded' in the welfare fabric of national societies and their normative quality is inextricably linked with the institutions and the law-generating processes of democratic constitutionalism. We cannot – and need not<sup>60</sup> – reconstruct these transformations here. It is important, however, in view of the many contrasting views, to underline that, in our understanding, private law is not an autonomous sub-system governed by some one-dimensional economic rational, but a dimension of democratic governance. We are indebted in this understanding to Jürgen Habermas' discourse theory of law and democracy in general, and to his co-originality thesis in particular.<sup>61</sup> Habermas has, in his *magnum opus* on legal theory, distanced himself from all equations of the normativity of private law with some given economic *ordo*, on the one hand, and the autonomy assigned to the economic system in Niklas Luhmann's systems theory, on the other.<sup>62</sup> The co-originality theorem seeks to overcome the age-old schism between the private autonomy of citizens in the economic sphere and their rights to political participation; thus, it reconciles private and public autonomy.<sup>63</sup> With this move, private autonomy obtained a

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cerned with a new juridification strategy; see his 'Integration/Disintegration als Code des Europäischen Verfassungswandels', in *Europäische Gesellschaftsverfassung*, ed. A. Fischer-Lescano *et al.*, (Baden-Baden: Nomos, 2009), 395-404, at 403 and in more detail *idem*, 'Three-dimensional Conflict of Laws in Europe', ZERP-DP 2/2009.

60 See Ch. Joerges, 'The Science of Private Law and the Nation-State', in *The Europeanization of Law. The Legal Effects of European Integration*, ed. F. Snyder (Oxford: Hart Publishing, 2000), 47-82.

61 As developed in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by W. Rehg, (Cambridge MA: MIT Press, 1996), 118 *et seq.*, (at 122). Lucid reconstruction: R. Nickel, 'Private and Public Autonomy Revisited: Habermas' Concept of Co-Originality in Times of Globalization and the Militant Security State', in *The Paradox of Constitutionalism*, ed. M. Loughlin & N. Walker, (Oxford: Oxford University Press, 2006).

62 N. Luhmann, *Die Wirtschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1988).

63 J. Habermas, *Between Facts and Norms*, note 61 *supra*, at 118 *et seq.*, (at 122); see also the lucid reconstruction by R. Nickel, 'Private and Public Autonomy Revisited:

new constitutional dignity. At the same time, it became embedded in democratic processes. ‘Co-originality’ is realised through the application of the discourse principle to ‘the general right to liberties ... and ends by legally institutionalizing the conditions for a discursive exercise of political autonomy’.<sup>64</sup> Hence, the legitimacy of law depends on:

*‘undistorted forms of public communication and indirectly on the communicational infrastructure of the private sphere as well. This is the key to a proceduralist understanding of law.’<sup>65</sup>*

It should be readily apparent why Europeanisation processes constitute challenges to the normative quality which private law has established in constitutional democracies. We have conceptualised this challenge earlier as a conflict between the functional logic of market integration and the normative logic of law generation in democracies.<sup>66</sup> The/This challenge - we would substantiate this formula now - is twofold: for one/, Europeanisation tends to decouple private law from its regulatory environment. This decoupling and disintegrating move has then to be compensated by re-regulatory activities at European level. Furthermore, Europeanisation tends to weaken the embeddedness of law-production in social and political environments. The first dimension is difficult enough. The democratic challenge, however, seems even more difficult to meet. We suggest that the conflicts approach provides promising prospects, although we by no means claim that it provides/furnishes ready-made answers. We will, in the following sections, proceed first inductively with a few case studies and then generalise our findings.

#### **IV. Exempla Trahunt: Three Patterns of Europeanisation of Private Law**

‘Less than a “system”, but more than just an ensemble of contingent case law’ – thus, the claim of the following analyses of the praxis of Europeanisation in private law by which we seek a third way between continental, in particular,

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Habermas’ Concept of Co-originality in Times of Globalization and the Militant Security State’ in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Reform* (Oxford: OUP, 2006).

64 *Ibid.*, p. 121.

65 *Ibid.*, p. 409.

66 Ch. Joerges & G. Brügge-meier, ‘Europäisierung des Vertragsrechts und Haftungsrechts’, in *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, ed. P.-Ch. Müller-Graff, (Baden-Baden: Nomos, 2nd ed. 1999), 301-360.



German, traditions and the agnosticism of legal realism. Hence, we do not expect that controversies and litigation will generate thanks to some invisible hand or the stringency of the legal argumentation of some doctrinally coherent ‘system’; though remarkable, efforts undertaking such reconstructions<sup>67</sup> cannot deliver much more than a/a form of heuristic. But this is not to say that we have to content ourselves with breaking the law down into a string or panopticum of individual cases. We submit that both the constructions of systems and the assemblage of decisional events can be replaced by the reconstruction of law generating patterns in the European polity. The plural in this suggestion is important: We have to be aware of the specifics of both conflict constellations and of the strategies of institutional and non-governmental actors, and of the specifics of European policy processes and European law. We should acknowledge that the European political system is not ruled by some supranational political authority with a *kompetenz-kompetenz*, and that, although the law provides an *ersatz* for such an authority, it will have to operate as the servant of many masters with competing or conflicting orientations. This is why we should not assume that the moves and the counter-moves in the processes of European law production will generate some uniform orientation and oscillate around some hidden equilibrium – but that they will, in their evaluation, focus on the normative quality of these processes.

Three sets of examples are being introduced, which exemplify, in turn, some significant patterns of Europeanisation of private law. Their ‘exemplarity’ is especially manifested in the range of options which they uncover for integration policy. In saying this, we implicitly suggest that these options include diverse, even opposite, perspectives which reflect with colliding concepts of Europeanisation. We also assert that their contest will not come to a rest, and that we should not expect any one pattern to acclaim a monopoly at any time in the future. Instead, each will individually be subjected to a range of experiences which will, in turn, provoke further learning processes.

#### *IV.1 Product Liability Law: On the Decoupling of Consumer Protection from Its Social Fabric and Objectives*

Consumer protection was the gateway for/of the European Community for/to? the realm of private law.[consider saxon genitive: was the European Community’s gateway into the realm... This was a very fortunate beginning, because the Community pioneered the overdue reform of national legal systems – and

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67 See K. Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts*, (Berlin: de Gruyter, 2003).

met with very active support from true academic entrepreneurs.<sup>68</sup> Since then, the consumer *problématique* has attracted ever-growing attention. The inherited labelling of ‘high’ and ‘low’ levels of consumer protection is not outdated, but it does not capture the ambivalent blessings of ‘high levels of consumption’ at ‘low prices’. This has led to dilemmas. While it has become apparent that ‘the legal construction of the consumer’<sup>69</sup> has to reflect new challenges which are discussed at highly sophisticated levels in economic sociology, political science and/as well as in historical reconstructions, which all observe the gradual transformation of the consumer as market agent into a political citizen,<sup>70</sup> the European Commission has turned its back on its once pioneering initiatives. With ever growing intensity, consumer protection is conceptualised as a market integration device of a one-dimensional and simplistic economic rationality.<sup>71</sup> This widely-noticed paradigmatic shift has damaged the alliance between the Commission and the academic community of consumer lawyers.<sup>72</sup> The partly realised and more generally envisaged replacement of the politics of minimum harmonisation, which left much political autonomy to the Member States by/with/through the strategy of ‘full harmonisation’ which seeks to preempt national alternatives to European regimes may turn into a pyrrhic victory. The strategy is at odds with the socio-economic diversity persisting, and even deepening, in Europe/which persists, and is even deepening, in Europe. In

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68 See, as chief publications, N. Reich & H.-W. Micklitz, *Consumer Legislation in the EC Countries. A Comparative Analysis*, (New York *et al.*: Van Nosstrand Reinhold, 1980); *Europäisches Verbraucherrecht*, 4th ed. 2003; D.M. Trubek & Th. Bourgoignie, *Consumer Law, Common Markets and Federalism in Europe and the United States*, (Berlin: de Gruyter, 1986).

69 M. Everson, ‘Legal Construction of the Consumer’, in *The Making of the Consumer*, ed. F. Trentmann, (Oxford-New York: Berg Publishers, 2006), 99-124; *eadem*, ‘European Citizenship and the Disillusion of the Common Man’, in *Conflict of Laws and Laws of Conflict in Europe and Beyond - Patterns of Supranational and Transnational Juridification*, ed. R. Nickel, RECON Report No. 7, Oslo 2009, 165-188.

70 N. Stehr, C. Henning & B. Weiler (eds), *The Moralization of the Market*, (Transaction Publishers, New Jersey, 2006); M. Bevir & F. Trentmann (eds), *Governance, consumers and citizens. Agency and resistance in contemporary politics*, (Basingstoke: Palgrave Macmillan, 2007).

71 See, for example, Ch. Schmid, ‘The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and its Implications on a European Contract Law Code’, *European Review of Contract Law* 1 (2005): 211.

72 H.-W. Micklitz & N. Reich, ‘Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights’, *Common Market Law Review* 46 (2009): 471; H.-W. Micklitz, ‘The targeted full harmonisation approach: Looking behind the veil’, in *Modernising and Harmonising Consumer Contract Law*, ed. G. Howells & R. Schulze, (Munich: Sellier European Law Publishers, 2009).

view of this diversity, the imposition of uniform rules on the balancing of market development and consumer demand do not make economic sense. They also risk the destruction of/destroying the social fabric of markets and consumption which remains, even after globalisation and Europeanisation in important respects characterised by national contexts: European consumer protection which started out as a mechanism promoting the social embeddedness of transnational markets is being turned into a disembedding exercise.<sup>73</sup>

Our discussion here focuses on one, albeit particularly spectacular example, namely. the product liability jurisprudence of the ECJ. This jurisprudence concerns the Product Liability Directive, once unanimously adopted under (the old) Article 100 EEC Treaty, on 25 July 1985.<sup>74</sup> The, then, governing unanimity rule explains why the directive regulates product liability law so incompletely,<sup>75</sup> and why it was bound to disappoint consumer advocates who had hoped for a flagship/that it would be the flagship of European consumer protection law.<sup>76</sup> The Directive was widely considered a marginal piece of legislation with little impact on the general tort law, particularly since Article 13 of the Directive did not, apparently, preclude concurring claims pursuant to other legal bases.<sup>77</sup> There was, at any rate, broad agreement that the Directive would not preclude further advances in consumer protection at national level because it was understood as prescribing only a set of conclusive minimum standards.

For a long time, these expectations appeared justifiable – until, starting with three judgments handed down on 25 April 2002,<sup>78</sup> the ECJ shattered them quite dramatically. In a formalistic reasoning, the Court recognised, to the great

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73 It is worth noting that a much better alternatives are conceivable under the Treaty of Lisbon: Art 12 (ex-Art 153(2) TEC) provides that ‘Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities’ This is but a general clause, albeit one which would sustain, if not require, more sophisticated responses to the multi-faceted consumption *problématique* in contemporary societies.

74 OJ L 210/1985. 29.

75 H. Koch, ‘Internationale Produkthaftung und Grenzen der Rechtsangleichung durch die EG-Richtlinie’, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 152 (1988): 537.

76 See G. Brüggemeier & N Reich, ‘Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach § 823 Abs. 1 BGB’, *Wertpapier Mitteilungen* 1986, 149.

77 See G. Brüggemeier, ‘Produkthaftung und Produktsicherheit’, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 152 (1988): 511..

78 Case C-52/00, [2002] ECR I-3827 *Commission v. France*; Case C-183/00, [2002] ECR I-3901; *María/Maria Victoria González Sánchez v. Medicina Asturiana SA*; Case C- 154/00, [2002] ECR I-3879 *Commission v. Greece*.

surprise of most observers, that the Directive's consumer protection provisions were not intended to introduce protective minimum standards, but to achieve 'full harmonisation', instead.

The three decisions just mentioned concerned the French, the Greek and the Spanish implementation of the Directive. The Spanish case is particularly frightening.<sup>79</sup> Mrs. Gonzalez Sanchez had to have a blood transfusion in the hospital run by the defendant institution (Medicinal Austrian SA). As a consequence of the transfusion, she was infected with the Hepatitis C virus. She based her action upon the Statute by which Spain had transposed the Directive into Spanish law, and, in addition, on the general liability provisions of Spanish civil law, and on the Spanish General Law for the Protection of Consumers and Users of 19 July 1984, under which the claimant had only to prove damage and causality. Under the Product Liability Directive, however, which was implemented in Spain 10 years after the 1984 Act,<sup>80</sup> she also had to prove that the hospital had produced the blood conserves, which she failed to show. Therefore, the success of her claim depended on the relationship between the three legal bases. Article 13 of the Directive provides that the Directive:

*'shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.'*

Does this mean, the Spanish court asked the ECJ, that the Directive could 'be interpreted as precluding the restriction or limitation, as a result of transposition of the Directive, of rights granted to consumers under the legislation of the Member State'?<sup>81</sup> To the unversed reader, the question may sound rhetorical. But the Court responded:

*'[...Article 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive.'*<sup>82</sup>

The provision that Article 13 does not affect claims on a different basis cannot

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79 On the following, see analyses by G. Viney, 'L'Interprétation par la CJCE de la Directive du 25 Juillet 1985 sur la Responsabilité du Fait des Produits Défectueux', *La Semaine Juridique*, 2002, I 177, 1945; J. Calais-Auloy, 'Menace européenne sur la jurisprudence française concernant l'obligation de sécurité du vendeur professionnel', *Recueil Le Dalloz* 2002, No. 31, 1458; B. Koch, 'Nationales Deliktsrecht vor dem EuGH – Irrungen und Wirrungen' in G. Roth & P. Hilpold (eds), *Der EuGH und die Souveränität der Mitgliedstaaten* (Vienna: Linde, 2008); for more details, see Ch. Schmid (note\* *supra*), especially part 2, section 4, chapter 5.

80 Case C-183/00 para. 7, 8.

81 *Ibid.*, para. 13.

82 *Ibid.*, para. 30.

‘be relied on in such a case in order to justify the maintenance in force of national provisions affording greater protection than those of the Directive’.<sup>83</sup>

In its analysis of the Community law provisions, the ECJ referred to Recital 1 of the Directive, according to which ‘approximation is necessary because legislative divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property’.<sup>84</sup> It had been necessary at the time to introduce this sentence, in order to ‘establish’ the Community’s (functional) legislative competence. Since then, the paragraph has become neither more empirically relevant, nor normatively more correct. Nevertheless, the Court’s judgment re-affirmed its value as a virtually teleological motivation for restricting the legislative autonomy of the Member States.<sup>85</sup>

European law, understood in this way, does not contribute much to the Europeanisation process. The preliminary rulings procedure has good institutional sense because it links the judiciary in Member States to the jurisdiction of the ECJ. But it can bear painful consequences for those who seek justice in a case that would not normally seem problematical.<sup>86</sup> After long years of litigation, Mrs. Sanchez finally knew whom she would have had to sue in order to enforce her rights. A result such as this one would be easier to accept if we could read into the ECJ’s judgment a constructive contribution to future developments in product liability law. This is hardly possible. The irony and tragedy of this development has already been underlined.<sup>87</sup>

The cited cases are spectacular, but, unfortunately, not exceptional. ‘Full harmonisation’ has become a strong *credo* in subsequent cases such as *Skov*,<sup>88</sup> and *VTB-VAB v Total Belgium* of 23/4/2009.<sup>89</sup> Most instructive, although also depressing, seems the parallel ‘interpretative turn to full harmonisation’ in the already legendary cases *Laval*<sup>90</sup> and *Rüffert*,<sup>91</sup> and their interpretation of the

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83 *Ibid.*, para. 33.

84 *Ibid.*, para. 3.

85 *Ibid.*, paras. 24, 25.

86 More generally, Ch. Joerges, ‘The Bright and the Dark Side of the Consumer’s Access to Justice in the EU’, *Global Jurist Topics* 1 (2001): No. 2, Article 1.

87 Text accompanying notes 65-66 *supra*.

88 C-402/03, *Skov*, [2006] ECR I-199.

89 C-261/07, *VTB-VAB v. Total Belgium*, nyr.

90 Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd.1, Svenska Elektrikerförbundet*, [2007] ECR I-10779.

#### IV.2 Company Law: Co-Original Economic Freedoms and Political Processes

The judgments in *Centros*,<sup>93</sup> *Überseering*,<sup>94</sup> *Inspire Art*,<sup>95</sup> and *Cartesio*<sup>96</sup> have been heralded by many proponents of a ‘privatisation’ of European private law as a powerful shift to regulatory competition as a new paradigm of the European economic constitution and has been heavily criticised by others, in particular, political economists, for precisely the same reason.<sup>97</sup> We believe that both views misunderstand the normative merits, or, at least, the constructive potential, of this jurisprudence. We will not go into the manifold implications, let alone review the plethora of analyses which these cases have attracted,<sup>98</sup> but we will instead focus on an aspect which is of fundamental importance for our argument, but has typically been overlooked:<sup>99</sup> the interplay between the economic freedoms, the legislative and the judiciary, which was generated by the political right of the European ‘market citizen’ in order to hold the national sovereign accountable for its legislation and to confront it with the politics of

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91 Case C-346/06, *Rechtsanwalt Dr. Dirk Rüffert v. Land Niedersachsen*, [2008] ECR I-1989

92 Directive 96/71/EC, OJ L 18/1996, 1. We refer to our critical comments in Ch. Joerges & F. Rödl, ‘Informal Politics, Formalised Law and the “Social Deficit” of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*’, *European Law Journal* 15 (2009): 1, and Ch. Schmid, ‘From *effet utile* to *effet neoliberal*: A Critique of the new Methodological Expansionism of the European Court of Justice’, in *Conflict of Laws and Laws of Conflict in Europe and Beyond - Patterns of Supranational and Transnational Juridification*, ed. R. Nickel, RECON Report No. 7, Oslo 2009, 421-446.

93 Case C-212/97, ECR [1999] I-1459 *Centros Ltd. v. Erhvervs - og Selskabsstyrelsen*.

94 Case C-208/00, ECR [2002] I-9919 *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*.

95 Case C-167/01, *Kanter van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, [2003] ECR I,.

96 Case C-210/06, judgment of 16 December 2008, *Cartesio Oktató és Szolgáltató bt*, nyr.

97 M. Höpner & A. Schäfer, ‘A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe’, MPIfG Discussion Paper 07/4, Cologne 2007.

98 Ch. Schmid (note\* *supra*), part 3, section 1, subsection 1, chapter 3.

99 See B. Trefil, ‘Centros und die Niederlassungsfreiheit von Gesellschaften in Europa’, EUI Working Paper Law 2003/9.

its neighbouring European jurisdictions. This right is, in our view, by no means to be understood as another example of partisanship of the integration project with neo-liberal economics, but, instead, as the co-original institutionalisation in the European polity of private and political autonomy in the sense which Jürgen Habermas has developed this idea in *Between Facts and Norms*.<sup>100</sup> This, in our view, is the normative significance of the *Centros*-case law, but equally its practical weakness.

The judgment in *Centros* concerns the core of the European legal *acquis*, namely, the freedoms of market citizens, which apply directly and ought, therefore, to take primacy over national law. The decision was widely praised as a milestone in the realisation of the market freedoms, as a contribution to the so-called negative integration and to the opening up of regulatory competition; but it also has wider implications.

A Danish married couple, Marianne and Tony Bryde, wished to import wine into Denmark. In order to do this, they planned to set up a company, but did not want to pay the fee of the DK 200,000 (28,000 €) that Denmark required for the registration of companies. In May 1992, they founded a private limited company in England, the now legendary Centros Ltd., and set up a subsidiary in Copenhagen – for none of these steps did they need the money that a regular registration in Denmark would have required. Unsurprisingly, the Danish authorities refused registration. The Brydes went to court. Seven years later, the ECJ handed down the following judgment to the referring Danish *Højesteret*. It found, rightly, that:

*‘It is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the state in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that state, are more restrictive as regards the paying up of a minimum share capital.’<sup>101</sup>*

Did the Court permit the Brydes, in Gerhard Kegel’s well-phrased words,<sup>102</sup> to ‘cock a snoot’ at the law? Or, and this may be the case’s most popular reading, was it the ECJ’s intention to allow for a more efficient legal framework for

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100 See the references in note 62 *supra*.

101 Sentence 1 of the tenor of the judgment, ECR [1999] I-1947.

102 In his editorial in *Zeitschrift für Europäisches Wirtschafts- und Steuerrecht* (8) 1999 (‘Es ist was faul im Staate Dänemark und anderswo...’).

company law in Europe?<sup>103</sup>

Maybe the truth lies in the middle? What is so abusive, really, about setting up a company in another Member State with a seemingly more beneficial regulatory system? Should we not simply understand it – as the ECJ does – as the exercise of a right afforded to European citizens, a right which does, however, cede to legitimate regulatory concerns – foreclosing the concerns of those who warn against the superiority of economic against political reason. The ECJ did not push aside Denmark’s right to enact compulsory provisions dealing with company law. It placed Denmark under pressure to justify why Danish registration fees would better serve the protection of creditors, which, according to the Danish government’s presentation, was the object of the Danish legislation. The Court remained unconvinced, partly because foreign companies were allowed to set up branches in Denmark without having to pay a registration fee, while the registration of a branch of Centros had been forbidden by the Danish authorities on the grounds that it did not carry out any commercial activity at the place of its first registration in the UK.

There are obvious parallels to the jurisprudence on Article 28 TEU (now Article 41 Treaty of Lisbon), which since *Cassis de Dijon*, thus for some decades, repeatedly found that Community law must preserve and respect national autonomy (‘*autonomieschonend*’), whilst national laws must pursue their legitimate regulatory interests in conformity with Community law (‘*gemeinschaftsverträglich*’). In other words, Danish citizens have the right to test their national sovereign in a European court – the Brydes made use of their right. In the event that it is found to be in breach of European law, the Danish legislator is given the chance to amend its laws – and it has done so.<sup>104</sup> The new regulation, justified by legitimate concerns of the Danish government to secure tax demands, may be called into question again.

*Centros* has not remained without consequences. The possibility that interested actors would try to test how far their new freedoms would reach and how much money they would save,<sup>105</sup> was easily predictable. Debate about the

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103 See H. Muir Watt, The Challenge of Market Integration, note 51 *supra* with references.

104 See B. Trefil, “Centros und die Niederlassungsfreiheit von Gesellschaften in Europa”, EUI Working Paper Law 2003/9, <<http://www.iue.it/PUB/law03-9.pdf>>, 31 et seq., referring to <[www.retsinfo.dk](http://www.retsinfo.dk)> and the doubts about the solidarity of the Danish ‘*Sonderweg*’.

105 The most recent, again widely discussed, example is Case C-210/06, *CARTESIO Oktató és Szolgáltató bt*, Judgment of 16 December 2008, nyr; there, the Grand Chamber, rejecting the views of AG Miguel Poiares Maduro, held that it makes a difference whether a company is moving out of its original jurisdiction or entering another one.



implications of *Centros* in terms of legal *systematique* was, however, dense – understandably so because this kind of explorations prepares the grounds for practically rewarding moves. It helps us to understand the following decisions better.

In a reference for a preliminary ruling by the Federal High Court of 30 May 2002 (*Überseering*),<sup>106</sup> the ECJ was asked whether German law could prevent a Dutch plaintiff company from suing for over 1,000,000 DM by, firstly, restricting in § 50 (1) of its *Zivilprozessordnung* standing to those legally competent (*rechtsfähig*) companies, and secondly, by prescribing that a company incorporated according to Dutch law could lose its legal capacity once it transferred its activities to Germany in a way which constitutes, according to German law, a transfer of its ‘seat’ (*Verwaltungssitz*).<sup>107</sup> In an internal market in which freedom of establishment exists as a right, such legal principles seem downright incredible.<sup>108</sup> In *Inspire Art*,<sup>109</sup> the ECJ continued its line of reasoning, and established that the right of a company set up under English law to carry on business in the Netherlands should be respected in principle; only for ‘good’ reasons, not accounted for in European secondary legislation, may this fundamental freedom be restricted.

The *Centros* judgment found Denmark’s regulatory interests *per se* legitimate. In the follow-up decisions, there was no need for the Court to discuss the limitations to the fundamental freedoms. But these questions have become increasingly pressing: How are the general reasons in favour of the ‘seat’ theory (*Sitztheorie*) – protection of creditors and of subsidiary companies; co-

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We also tried out to find out what had motivated the Hungarian Company to move the “seat/headquarters” of its activities (*inter alia*, in the field of human resources, secretarial activities, translation, teaching and training’, para. 22) from Baja, Hungary, to Gallarate, Italy. It seems to us that the case was invented by a Hungarian law professor. This raises the question of why the Grand Chamber was ready to hand down such a judgment. It may have been motivated by the lively discussions and uncertainties over the reach of the principle announce in the *Centros* jurisprudence.

106 German Federal Court, *Europäische Zeitschrift für Wirtschaftsrecht* 15 (2000): 412.

107 See para. 45 of the Opinion of Advocate-General Colomer on 4 December 2001 for Case C-208/00 *Überseering BV v. NCC GmbH*.

108 Eventually, the representation made by the German government that the plaintiff could have acted as a personal company without legal personality under German law (cited in AG Colomer’s Opinion at para. 55; see, also, Roth, ‘Internationales Gesellschaftsrecht nach Überseering’, *Praxis des Internationalen Privat- und Verfahrensrechts* vol (2003): 117 & 123 et seq.), will not suffice; poignantly E. Schanze & A. Jüttner, ‘Anerkennung und Kontrolle ausländischer Gesellschaften’, *Die Aktiengesellschaft* (2003): 30.

109 Case C-167/01, U. v. 30.09.2003, *Kamer van Koophandel v. Inspire Art Ltd.*.

determination; the avoidance of double taxation – to be accounted for in the future? Not by invoking the seat theory! In Europe’s multi-level system, the latter will, in principle, be substituted by the ‘incorporation’ theory (*Gründungstheorie*), although this theory, too, will have to undergo significant modifications in order to conform with Community principles.<sup>110</sup>

### IV.3 *Altmark Trans: Diagonal Conflicts in the European Multi-level System*

One of the most important characteristics of the Europeanisation process is that it disconnects what is traditionally considered ‘private law’ from its regulatory context. This is one of the inevitably disintegrative effects of integration, legally rooted in one of the Community’s core principles: the EU’s competences are restricted to the fields enumerated in the Treaty. Amongst them, we find practically the whole field of regulatory law, and the Community has used these competences extensively. The real world, however, continuously brings up constellations in which the demarcation of competences in the Treaty does not correspond with real existing and interconnected regulatory problem constellations. Typically, the European level is competent to regulate one aspect of a problem, while Member States remain competent to regulate another one. The term ‘diagonal’ is used to distinguish such constellations from, on the one hand, ‘vertical’ conflict resolutions in which Community law trumps national law, and from ‘horizontal’ conflicts which arise from differences among the Member States’ legal systems, and which belong to the domain of PIL, on the other.<sup>111</sup> The term ‘diagonal’ conflicts captures a structural characteristic of the European multi-level system. Neither the European level, nor the national level

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110 E. Schanze & A. Jüttner, ‘Annerkennung und Kontrolle ausländischer Gesellschaften. Rechtslage und Perspektiven nach der Überseering-Entscheidung des EuGH-Entscheidung “Inspire Art”’, *Die Aktiengesellschaft* 2003: 36 consider these concerns to be exaggerated and rather unhelpful for the development of a control theory moderated by European law (‘europarechtlich moderierte Kontrolltheorie’); see, in a similar vein, P. Ulmer, ‘Schutzinstrumente gegen die Gefahren aus der Geschäftstätigkeit inländischer Zweigniederlassungen von Kapitalgesellschaften mit fiktivem Auslandsbesitz’, *Juristen-Zeitung*, 54 (1999): 662.

111 Ch. Joerges, ‘The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective’, *European Law Journal* 3 (1997): 378; Ch. Schmid, ‘Vertical and Diagonal Conflicts in the Europeanisation Process’, in *Private governance, democratic constitutionalism and supranationalism* ed. Ch. Joerges & O. Gerstenberg, (European Commission COST A 7 EUR 18340, 1998): 185-191, with very limited resonance in the legal community; but see Germany’s First Lady of sociology, note 115 *supra*.

is in a position to address a specific problem in its entirety: European and national actors are thus forced to co-ordinate.

Examples are legion, even though they do hardly ever appear in the literature under the titles that we have suggested. We restrict ourselves to one:<sup>112</sup> the *Altmark Trans* judgment of 24 July 2003<sup>113</sup> illustrates the implications of the privatisation<sup>114</sup> of public services, induced by European law; these Europeanised so-called ‘Services of General Interest’ or ‘*Daseinsvorsorge*’ are controversial because they meet with firmly embedded national regulatory traditions, expectations and interests. The regulations that they affect are not as much intertwined with private law as they may be in constellations in which national private law pursues regulatory goals that may collide with some of the goals of European regulatory law. However, privatisation initiatives are a major concomitant of integration; they affect the realm of private law as they determine to what extent services can be assigned to the market.

‘*Daseinsvorsorge*’ was brought under the auspices of public law upon the basis that it affected basic human requirements in industrialised times. The German term was coined by no less than Karl Jaspers *before* 1933. The fact that Ernst Forsthoff in 1938 re-applied the term in the context of administrative law<sup>115</sup> is no argument as such. *Daseinsvorsorge* has gained social and democratic legitimacy in Germany and, albeit in different varieties, in many other countries.<sup>116</sup> Critics, for example, the advisory committee of the German Federal Ministry of the Economy, would regard its protection by legal norms as an encroachment of/on the citizens’ economic rights to free participation in the cross-border transfer of goods and services.<sup>117</sup> The Treaty of Lisbon, however, acknowledges ‘the place occupied by services of general economic interest in

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112 See, more comprehensively, Schmid (note\* *supra*), part 3, section 1, subsection 1, chapter 2.

113 Case C-280/00, *Altmark Trans GmbH v. Regierungspräsidium Magdeburg und Nahverkehrsgesellschaft Altmark GmbH*, ECR 2003, I-07747.

114 On this process, see ‘Communication on Services of General Interest in Europe’ (COM (1996) 443 final of 11 September 1996), ‘Report on Services of General Interest’ (COM (2001) 598 final of 17 October 2001) and the ‘Green Paper on Services of General Interest’ (COM(2003) 270 final of 21 May 2003).

115 ‘*Daseinsvorsorge als Aufgabe der modernen Verwaltung*’, *idem.*, *Die Verwaltung als Leistungsträger*, (Stuttgart-Berlin: Kohlhammer, 1938).

116 The literature is, of course, overwhelming. For a recent comprehensive analysis, see M. Krajewski, *Grundstrukturen des Rechts öffentlicher Dienstleistungen*, (Heidelberg: Springer, 2010 forthcoming).

117 Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft, *Daseinsvorsorge im europäischen Binnenmarkt*, Berlin 2002.

the shared values of the Union as well as their role in promoting social and territorial cohesion' (Article 14, ex Article 16 TEC). Pertinent research has revealed the sensitive political effects of privatisation strategies<sup>118</sup> – and it is safe to predict that these controversies will remain vivid?<sup>valid?</sup> The ECJ seems to be well aware of all this.

*Altmark Trans* concerned subsidies awarded to public transport undertakings in the *Landkreis* of Stendal in Germany. The case itself may seem insignificant, but the ensuing questions are of fundamental importance: Should the availability of public transport be organised upon the basis of social welfare and distributional justice or upon the basis of efficiency? Is this an openly political question to be decided by the German *Laender/Länder* and communes, or a legal question for Community law to answer? The ECJ exercised wise judicial restraint. It did not impose a political option but, instead, designed a legal framework which leaves room for political processes and decisions – and still protects European concerns. This is, it seems to us, the core message of the decision, which also brought up difficult questions of law concerning the interplay between secondary Community law and the German public transport law (*Personenbeförderungsgesetz*) as amended in 1995. *Altmark Trans GmbH* and *Nahverkehrsgesellschaft mbH* both sought to organise public transport in the *Landkreis* of Stendal in Sachsen-Anhalt, one of the German *Länder*. *Altmark* had been licensed, and had its/the licence renewed by the *Regierungspräsidium*, while the bid by *Nahverkehrsgesellschaft mbH* was rejected. The central question of law occupying the ECJ was: Did the subsidies given to *Altmark Trans* after it had been granted the licence to organise bus traffic in the *Landkreis* Stendal qualify as state aid within the meaning of Article 87 TEU (Article 107 Treaty of Lisbon)? If yes, then they would be subject to the Commission's competences under the Treaty provisions on state aid.

The Court's response sounds like old-fashioned legal formalism: following its own case law, the Court finds that an official act does not constitute state aid within the Treaty unless it includes an 'advantage' to the beneficiary undertaking. Advantages for the purpose of state aid exclude financial means provided by the state by way of compensation for the public service obligations undertaken by the service provider. But the Court goes further, operationalising its own distinction by four criteria:<sup>119</sup> (1) The recipient must be required to discharge clearly defined public service obligations; (2) The parameters of the calculated compensation must be established in advance in an objective and transparent manner; (3) The compensation must not exceed the costs plus a

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118 P. Le Galès & A. Scott, 'Die Wiederherstellung des Marktsubjekts', *Berliner Journal für Soziologie* 19 (2009): 6.

119 Case C-280/00 (note 113 above), paras. 89-95.

reasonable profit; and (4) Decisions are to be taken either after a public procurement procedure or the level of compensation is to be determined upon the basis of an analysis of the costs of a typical undertaking, well run and adequately provided with adequate means of transport.

These responses do bear some problems. They need to be further concretised and their implementation will be challenging. But they have high normative qualities: European law does not take a stand for or against the organisation of public services through national welfare states; it decides neither for nor against the market. Instead, it puts justificatory pressure on national politics, and forces those who organise public services to explain how they fulfil their social mandate. It ‘constitutionalises’ the multi-level system so as to accommodate the decentralised exercise of formative (national) political freedom, whilst, at the same time, allowing for European concerns to afford market access to non-local suppliers. And if this were to prove a successful solution which both guaranteed and manifested some social sense in national practices, then it would be an achievement that, to date, has remained hardly conceivable in most integrated political systems<sup>120</sup> – a ‘proceduralised’ conflict solution *par excellence*.

## **V. *Verba Docent*: On the Procedural Legitimacy of the Europeanisation Process**

We will now try to bring the abstract deliberations in the first part and the analyses of the second part into a generalising synthesis. This will take three steps. The first is based upon the understanding of Europe as a multi-level system and demonstrates its implications for integration policy. Normative dependencies of political action become apparent in this process and are being reconceptualised, in a second step, in legal categories. In a final step, we will sketch out the legal constitution of the Europeanisation process itself, which, such is our claim, must be designed procedurally, in order to overcome the impasses of European law and the methodological nationalism in comparative law and PIL.

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120 See M. Zürn & Ch. Joerges (eds), *Governance and Law in Post-National Constellations. Compliance in Europe and Beyond*, (Cambridge: Cambridge University Press, 2005).

## V.1 *Transforming the Analytics of Multi-level Governance into Legal Categories*

With the first step, we can simply repeat: Europe is no federation, but more than a regime. It can be analysed as a heterarchically structured multi-level system. Since powers and resources are located at various and relatively autonomous levels, the EU must, in order to cope with its functionally interwoven problem-constellations, organise its political action in networks. Political activities will hence depend on the communication between the various relatively autonomous and, at the same time, mutually dependent actors and institutions.<sup>121</sup> Jürgen Neyer formulated his thesis in a most concrete fashion, usually avoided by political scientists: the EU-specific conditions for political action favour a deliberative mode of communication that is bound by rules and principles, and where arguments are accepted only if they are capable of universal application.<sup>122</sup> These observations have led political scientists to the conclusion that the European construct will strengthen the normative dimensions of political interactions. If there is a kernel of truth in such an assumption, the law can build upon the ‘facticity of normativity’. However, this is not to equate analytical, normative, and legal categories. What, instead, seems conceivable is to design legal frameworks which are likely to stabilise and to further the normative quality of political interactions, *i.e.*, to transform strategic action into a deliberative style of politics.

This, however, is but a first bridging of political and legal science. To read into this exercise the insinuation of a transformation of the European Union into a deliberative democracy would, at best, be a sad misunderstanding.

## V.2 *The Idea of a Three-dimensional European Conflicts Law*

How, then, may the law profit from the normative surplus of the European political system? We have to refer here to the systematic elaboration of responses to this query.<sup>123</sup> Suffice it here to summarise some core points. As we have underlined, the European multi-level system of governance must cope with horizontal, vertical and diagonal tensions and conflicts.<sup>124</sup> For this simple reason, we suggest that European law ‘is’ conflicts law. This law needs to emancipate

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121 See III.1 *supra*.

122 ‘Discourse and Order in the EU. A Deliberative Approach to Multi-Level Governance’, *Journal of Common Market Studies* 41 (2003): 687; more detailed in his habilitation thesis, *Postnationale politische Herrschaft*, 2004.

123 See references in note 59 *supra*

124 Section III.1.

itself from the legacy of methodological nationalism. This is a functional necessity because the conflicts which it has to resolve cannot be decided by the choice of one national set of rules. This necessity generates at the same time a unique normative chance and vocation: to re-state the passage from which the whole conflicts-law construction departed:

*'The legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If and, indeed, because] democracies pre-suppose and represent collective identities, they have very few mechanisms to ensure that 'foreign' identities and their interests are taken into account within their decision-making processes.'*<sup>125</sup>

European law is to compensate the democracy deficits of the nation state. This is its vocation and normative dignity, which the ongoing discussion on the so-called European democracy deficit fails to capture.

This starting point needs to be substantiated further in view of the variety of conflict constellations in the Union, its system of competences – and the fact that European integration is concerned not with *laissez-faire* politics, but with the mixed economies of welfare states. This is why European conflicts law has to develop two additional dimensions which accommodate the institutional side of conflict settings. Its second dimension is concerned with the building up of transnational regimes such as comitology, which deal co-operatively with common problems. The third dimension is generated by the involvement of non-governmental actors in the management of public affairs.

All of these three dimensions are present in Europe's private law. There is a need for rules which institutionalise European markets and ensure their functioning. It is as indispensable in European markets as in national markets to synthesise the functioning of markets and the compensation of market failures by regulatory politics. It is equally indispensable to organise the co-operation of non-governmental actors and to supervise such involvement.

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125 Ch. Joerges & J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', *European Law Journal* 3 (1997): 273-299, at 293. In a very similar vein, see R. Howse & K. Nicolaïdis, 'Democracy without Sovereignty: The Global Vocation of Political Ethics', in *The Shifting Allocation of Authority in International Law. Considering Sovereignty, Supremacy and Subsidiarity. Essays in honour of Professor Ruth Lapidoth*, ed. Tomer Broude & Yuval Shany, (Oxford: Hart Publishing, 2008), 162-191 (at 166: 'Supremacy serves as a meta-norm of *conflict of law* between Member States such as to enhance the representation of foreigners inside the jurisdiction of every Member State, and to ask when and to what extent these interests should trump the domestic social contract').

### V.3 *Constitutionalisation Through Proceduralisation*

We have underlined so far only functional reasons for the emergence of the second and third dimensions of European conflicts law, and postponed a discussion of its normative problems and potential. The functional argument is easy to defend. Modern markets are to be understood as social institutions. Private law, in the narrow sense, is as indispensable for their establishment as it is insufficient. The second and the third dimension of conflicts law are the transnational sisters of very general developments in the law of contemporary democratic societies. But is it at all conceivable that the normative qualities of the legal systems of constitutional democracies can be defended and reconstituted at transnational levels?

The case studies in Section IV all resort mainly in the ‘first dimension’ of European conflicts law. They convey mixed messages: it seems clear to us that the ECJ’s product liability jurisprudence with its ‘maximum harmonisation’ doctrine is misconceived. This jurisprudence ignores the contexts in which liability law operates and which needs to be taken into account in any reasonable assessment of fault and liability, objective standards of negligence, the design of product safety legislation and of self-regulation (standardisation and certification). The ECJ’s performance in company law seems to us to contrast positively in principle. Here, the Court pronounced clear and consistent orientation, on which secondary Community law as well as national legal systems can build. Most remarkably, in our view, is the conferral of political rights on the ‘market citizen’, which mirror the co-originality of private and public autonomy. The Court’s findings on the privatisation of public services appear equally productive. Legal traditions, social expectations, political preferences, and administrative know-how and market innovation – all these are very different between Brittany and Estonia, between the Faroe Islands and Sicily but, nevertheless, need to accommodate core European principles.

The messages are diverging, but our conclusions point in one direction: European law is ‘best’ when it recognises the difference between uniformity and justice, where/when it teaches us how to live with diversity. The implication of this insight is far-reaching. European integration must not abandon the project of integration through law. Law remains the only conceivable chance to discipline political rule, ensure political participation and protect human rights. However, the complexity and the dynamics of the integration process require the institutionalisation of continuous law-production (*‘Recht-Fertigung’*) rather than the elaboration of some comprehensive substantive *corpus juris*. ‘Proceduralisation’ is the mode of law production, which has to ensure its normative quality, which has to build upon the inter-actions among the law-producing actors, the intensity of societal scrutiny, and the capability of courts



and other legal *fora* to examine whether such law production ‘deserves recognition’.<sup>126</sup> This type of incremental efforts to settle the tensions inherent in Europe’s diversity, the discovery of fair solutions, the detection of failures and their subsequent correction, is maybe, both a challenge and a chance.<sup>126</sup>

## **Epilogue: Conflicts Law, Proceduralisation and ‘Social Justice’ in Europe’s Private Law?**

Can we expect this mode of proceduralisation in European law to ensure the compatibility of open markets with regulatory concerns and promote social justice? ‘The Social Sphere/0’ in European private law is the focus of an ongoing debate, which was not opened, but was significantly intensified by the ‘Manifesto on Social Justice in European Contract Law’,<sup>127</sup> which both of us have signed. We do neither retract our signatures nor engage here in a discussion of the more recent pertinent contributions.<sup>128</sup> The objective of our essay is distinct. We wish to underline three aspects, which are, in our view, not sufficiently taken into account which have not, in our view, been sufficiently taken into account in the social justice debate. Our substantive concerns start from the conflict constellations in the European polity. Sensitivity to socio-economic differences and respect of political and cultural diversity is a dimension of justice in European private law, to which our approach seeks a systematic answer. A related second concern is the decoupling of private law from its national regulatory environment. As indicated, markets are to be understood as social institutions which need a ‘visible regulatory hand’.<sup>129</sup> Justice in the private sphere cannot rely exclusively on the horizontal effect of fundamental rights. Its pursuit requires legislative and regulatory measures - not only at national, but also at European level. The third concern is with democracy: ss underlined again and again, law production, ‘*Recht-Fertigung*’, in the Union has to operate in de-centralised arenas. The European legal system, its legislation, its regulatory machinery, and its courts are required to exercise mediating and

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126 For an elaboration in the ‘second’ and the ‘third dimension’ of conflicts law cf. the references in note 59 *supra*.

127 *European Law Journal* 6 (2004): 653-674.

128 U. Mattei & F. Nicola ‘A “Social Dimension” in European Private Law? The Call for Setting a Progressive Agenda’, *Global Jurist Frontiers* 7 (2007), Article 2; H. Collins, *The European Civil Code*, (Cambridge: Cambridge University Press, 2007); H.-W. Micklitz, ‘The Visible Hand of European Regulatory Private Law’, EUI Working paper Law No. 2008/14.

129 H.-W. Micklitz, *op. cit.*

co-ordinating functions in Europe's complex conflict constellations. Conflicts law and its procedural methodology are the counter-movement against the reliance on self-governing markets, on the one hand, and the practices of de-legalised quasi-political bargaining as under the so-called Open Method of co-ordination, on the other. But is not precisely this somewhat indeterminate reference to contingent contexts the Achilles heel of proceduralisation, Joseph Corkin has objected.<sup>130</sup> There is indeed no safe ground on which we could build – but we do not see a road to more safety. In the large and enlarging Union social and legal dis-embedding strategies and re-embedding efforts, moves and countermoves will not come to an end. The European jurist will have to do and be aware of exercise both, '*Rechtswissenschaft in Kritik und als Kritik*' (Critique of legal science and legal science as critique).<sup>131</sup> Rudolf Wiethölter's formula captures and mirrors real world tensions and their controversial conceptualisations.

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130 'European Law as "Conflicts Law": The Implications for Individual Autonomy', in *Europäisches Privatrecht im wissenschaftlichen Diskurs*, ed. A. Furrer (Bern: Stämpfli, 2006), 391-416.

131 R. Wiethölter, *Rechtswissenschaft in Kritik und als Kritik* (Mainz: Universitätschriften, 1973).

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